



# Department of Law Monthly Report

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## Collections & Support

### FAREWELL TO TERISIA

In the month of February, the Collections and Support section said farewell to AAG Terisia Chleborad, who transferred to OSPA last month. Terisia was with the section for over seven years and contributed a great deal to the development of child support law in Alaska. She will be greatly missed.

### COLLECTIONS AND MORE COLLECTIONS

During the past month, the collections unit opened four new OSHA penalty collection files and closed five OSHA penalty and seven APOC penalty collection cases. Demand letters were sent to three debtors. Defaults were filed in two APOC collection cases. On the criminal side, the unit has received a total of \$2,948,651.89 from the 2001 PFD attachment through February. Including voluntary payments, we have collected approximately \$3.2 million this fiscal year to date. The unit sent 36 letters responding to written inquiries from defendants and courts regarding payment agreements and other collection issues. We requested 18 refunds be issued and distributed 15 refund checks to defendants, courts, and other agencies.

## In This Issue

COLLECTION & SUPPORT SECTION .....	1
COMMERCIAL SECTION .....	2
ENVIRONMENTAL SECTION .....	3
FAIR BUSINESS PRACTICES .....	3
GOVERNMENTAL AFFAIRS .....	5
HUMAN SERVICES .....	6
LEGISLATION/REGULATIONS .....	6
NATURAL RESOURCES .....	6
OIL, GAS, & MINING. ....	7
SPECIAL LITIGATION .....	8
TRANSPORTATION .....	8
CRIMINAL DIVISION .....	9
OSPA .....	14
PETITIONS & BRIEFS OF INTEREST .....	15
COURT DECISIONS OF NOTE – ALASKA	16

The collections unit is now receiving victim restitution judgments for collection and responding to inquiries from recipients regarding collection services. In February, the unit received 34 restitution judgments, 12 of which were returned to the issuing courts due to insufficient information. Initial notices were sent to the recipients in the other 22 cases. Our office received nine payments toward restitution judgments in February.

### **PATERNITY TESTING REQUIRED**

The section has been moving forward with *ex parte* applications to the court for enforcement of orders for genetic testing in administrative paternity proceedings. This is a relatively new procedure by which CSED, through the Attorney General's Office, asks the court to order a putative father to show cause for his failure to comply with the administrative testing order. Trained CSED personnel attend the show cause hearing with the assistant attorney general so that test samples can be collected from the defendant at the hearing. Once the testing has been completed, the agency can complete the administrative paternity establishment action. So far, the process has been successful. During the month of February, three such hearings were held in Anchorage. The defendant acknowledged paternity in one hearing, and the defendants were tested by CSED personnel at the other two hearings. In addition, three hearings were vacated because the defendants complied with the administrative testing order prior to the hearing date.

### **Commercial Section**

### **SUPERIOR COURT AFFIRMS DISCIPLINE OF KETCHIKAN REAL ESTATE APPRAISER**

In February, Juneau Superior Court Judge Patricia Collins affirmed a decision by the

Board of Certified Real Estate Appraisers to discipline appraiser Ronald W. Wendte.

Wendte, who represented Ketchikan in the state legislature from 1983 to 1984, held volunteer leadership positions in several local youth organizations. From approximately 1990 through 1996 Wendte embezzled approximately \$257,549 from various youth groups, including the Ketchikan Little League, District Two Little League, and the Ketchikan Girls Basketball Club. Wendte was indicted for 10 felony offenses, but eventually pled no contest to one consolidated count of Theft in the First Degree, a class B felony. He was sentenced to five years in prison, with four years suspended, to perform 1,000 hours of community work service, and to pay restitution.

Following Wendte's release from custody, the Division of Occupational Licensing filed an accusation seeking the revocation of Wendte's real estate appraiser certificate. After a hearing, the administrative hearing officer determined that Wendte had been convicted of "a crime involving moral turpitude" under AS 08.87.210(2) and proposed to the board that Wendte's license be suspended for two years. The board accepted the hearing officer's recommendations and ordered the two-year suspension, beginning December 23, 2001. AAG Gayle Horetski handled the case during both the administrative and superior court proceedings.

### **ALCOHOLIC BEVERAGE FORFEITURE**

On behalf of the ABC Board, AAG Linda Kesterson filed an *In rem* civil forfeiture action against various types and quantities of alcoholic beverages that had been stored by a licensee (Airport Restaurant and Lounge) in Unalaska. Title 4 requires a licensee to obtain board approval for off-premises storage of alcoholic beverages. Title 4 further provides that if alcohol beverages are stored in violation of that requirement, they are subject to forfeiture. The items are subject to forfeiture even where, as in this case, a criminal

proceeding for violation of the requirement has resulted in an acquittal. Due to weather-related delays to and from Unalaska, service of process is still pending.

## Environmental

### **BEST AVAILABLE TECHNOLOGY REQUIREMENT FOR DEC OIL SPILL CONTINGENCY PLANS**

On February 1, the Alaska Supreme Court in *Lakosh v. Alaska Department of Environmental Conservation* found parts of DEC's regulatory criteria, for determining whether a contingency plan used best available technology (BAT), to be inconsistent with statute. These regulatory criteria were developed as part of a negotiated rulemaking in 1997. The court's ruling was a narrow legal decision focusing on the language of the regulations as opposed to a technical determination of whether any particular equipment or technology is indeed best available.

In finding parts of the regulations inconsistent with statute, the court relied upon the dictionary definition of the term "best" and concluded that in the absence of legislative history to the contrary, the BAT regulations could not rely on the stringent response planning standards for oil spill response technologies in determining BAT or rely on performance standards set forth in regulation for determining BAT for oil spill prevention technologies. The court concluded that, while reliance on performance standards for determining BAT had considerable theoretical merit, the absence of specific legislative history on interplay between these standards and the BAT requirement led the court to the conclusion that the 1997 BAT regulatory criteria should be invalidated as inconsistent with statute. The supreme court reversed the superior court's grant of summary judgment to

DEC on the regulation's validity. A petition for rehearing is pending before the supreme court requesting that the court revise its opinion to refer to oil spill response standards in the contingency plan by the statutory term "response planning standards."

Legislation that would reverse the Lakosh case and affirm the 1997 regulations and the contingency plans approvals using the 1997 regulations has passed the Alaska Senate (SB 343) and is now under consideration in the House. In the meantime DEC has proposed revisions to its BAT regulation in response to the court's ruling. AAG Breck Tostevin represented DEC in these matters.

## Fair Business Practices

### **PHYSICIAN'S LICENSE SUSPENSION SUBJECT OF HEARING**

A hearing occurred regarding the State Medical Board's order summarily suspending the medical license of a local physician practicing cosmetic surgery based on a finding that he posed a "clear and immediate danger to public health and safety." AS 08.64.331(c). At the hearing, the Division of Occupational Licensing presented evidence from five medical experts to support summary suspension, which identified a continuing pattern of the physician's failure to (1) properly assess his patients' candidacy for various surgical procedures; (2) fully disclose to his patients the risks of complications; (3) perform these various procedures in a manner suited to reduce risk; and (4) provide appropriate post-operative medical care. The matter is before the hearing officer for recommended decision to the board on whether to sustain the summary suspension. A separate hearing with regard to the ongoing disciplinary action against the same physician is currently scheduled to commence in April, 2002. AAG Robert Auth is representing the division in both the suspension and the disciplinary proceedings.

## **CNA LICENSE REVOCATION UPHELD**

The Board of Nursing rejected a certified nurse aide's motion to reconsider its December 5, 2001, order revoking the nurse aide's license. Following a hearing and a proposed decision by the hearing officer, the board's December 5 order found that licensee, an in-home care provider for a quadriplegic adult woman, (1) obtained his original license (and subsequently renewed it) through fraud, deceit, and intentional misrepresentation; (2) physically assaulted his client; (3) abandoned his client; and (4) engaged in an ongoing consensual sexual relationship with his client, all of which violated various disciplinary statutes or regulations. AAG Robert Auth represented the Division of Occupational Licensing in this proceeding.

## **DENTIST SURRENDERS LICENSE**

AAG Roger Rom represented the Division of Occupational Licensing at hearing following the dental board's summary suspension of an Anchorage dentist's license. Summary suspension was based on specific dental procedures and practices that posed a clear and immediate danger to public health and safety. After approximately five weeks of hearing, the division was prepared to call three former dental assistants and a former dental partner in rebuttal to witnesses and evidence presented by the dentist. At the dentist's request, these witnesses were scheduled to be deposed before presentation at hearing. Following deposition of the first former dental assistant, the dentist surrendered his license. The dental board subsequently accepted the surrender, which ended the proceedings on the summary suspension.

## **INSURANCE ENFORCEMENT ACTION**

The director for the Division of Insurance, in his capacity as statutory receiver in an insurance company liquidation proceeding,

received a favorable ruling from Anchorage Superior Court Judge Reese that upheld the director's decision to deny the claim against the company's assets brought by a former owner and principal of the company. This claim was based on a surplus note executed in favor of another business owned by the principal in exchange for a \$500,000 deposit to company accounts. The company also had executed a second surplus note in favor of the same business in exchange for a \$600,000 deposit to company accounts. The principal did not submit a claim in the liquidation for the \$600,000 note, because he said it was already satisfied before the company went into liquidation through the sale of company-owned bonds.

The receiver's review of company records revealed that both sums of money were deposited (on different days) to a company bank account several months after the money was reported to have been deposited on annual and quarterly reports submitted to the division. The records also showed \$500,000 leaving a company account three days after deposit through electronic transfer to some other account not owned by the company.

During a three-day evidentiary hearing before Judge Reese, the company principal was never able to explain what happened to the \$500,000 and offered no evidence that the money actually stayed within the company's control. Judge Reese concluded that, based on the evidence, it appeared the principal had engaged in some sort of shell game with the \$500,000 and ruled as a matter of law that the \$500,000 had been repaid. AAG Signe Andersen represented the director in review and denial of this claim. Outside counsel was retained to represent the director as receiver at the evidentiary hearing.

## **WASHINGTON STATE BROKER SETTLES**

AAG Andersen also represented the division of insurance in settlement negotiations to resolve statutory violations of the insurance code by a

Washington State insurance broker. These violations arose out of an examination of the broker's operations that revealed the broker was placing aviation insurance for risks in Alaska without the appropriate surplus lines license and without complying with the requirements of the insurance code related to surplus lines transactions. The proposed settlement, which involves payment of civil fines, maintaining proper licensure, and payment of appropriate taxes and fees for surplus lines transactions, will be submitted to the director for approval.

### **VIATICAL SETTLEMENT REGS REVIEWED**

AAG Nick Atwood concluded four regulation review projects for the Division of Insurance, the most significant of which was a review of regulations pertaining to viatical settlements. In these lengthy regulations, the Division of Insurance established comprehensive rules and procedures pertaining to viatical settlements, including such things as licensing and reporting requirements, fair marketing, and various consumer protection provisions.

In general terms, a viatical settlement is the sale of a life insurance policy to a third party. The owner of the life insurance policy sells it for a cash payment that is less than the full amount of the death benefit. The third party that purchases the life insurance policy becomes the new owner and/or beneficiary and collects the full amount of the death benefit when the insured dies. People may decide to sell their life insurance policies for many reasons. The most common reason is because the owner has a terminal illness and wants additional cash to pay expenses. Another reason is because the owner can no longer afford the insurance premium and wants a cash benefit from the policy. The regulations and the enabling statutes are designed to help protect against fraud in these transactions.

### **WRONGFUL DISCHARGE DECISION UPHELD**

In a memorandum opinion, the Alaska Supreme Court upheld Judge Shortell's grant of summary judgment in a wrongful discharge case. The plaintiff, Carl Hanadel, had worked as a cook at the Spring Creek Correctional Center. Mr. Hanadel – who represented himself – claimed that the state and his former supervisor had wrongfully terminated his employment and had discriminated against him because of his sex. The Alaska Supreme Court ruled that Judge Shortell had correctly found that there were no genuine factual issues concerning Mr. Hanadel's claims and that the state and former supervisor were entitled to judgment as a matter of law. The court did, however, reverse the award of attorney's fees against Mr. Hanadel. The court remanded the fee award to the superior court to consider how Mr. Hanadel's federal civil rights claims should affect the award.

### **DHSS AND EMPLOYEE SETTLE**

The Department of Health and Social Services reached a settlement agreement with a plaintiff state employee who sued for back wages for the time between his dismissal and reinstatement in a union grievance proceeding. The plaintiff agreed to dismiss the lawsuit with prejudice and pay \$350 in state attorney's fees. *Kamletz v. State of Alaska*.

### **ALASKA INTER-TRIBAL COUNCIL (AITC) ET AL, V. STATE, ET AL**

A March 22, 2002, scheduling conference solidified the trial date for this case, now tentatively scheduled to begin April 1. Motions for clarification & reconsideration of an earlier summary judgement order are still pending before Superior Court Judge Sharon Gleason. The number of plaintiffs has narrowed to

include the Akiachak Native Community, the Tuluksak Native Community, and six individuals. The lawsuit centers on an allegation that the level of trooper service in the Bush violates equal protection. The plaintiffs claim that the state delivers a "dual policing system" that adversely affects remote native villages. Representing the state in this case: Jim Baldwin (lead attorney -- Juneau AGO), Dean Guaneli (Criminal Division), and Mike Mitchell (Anchorage AGO).

## Human Services

### TERMINATION OF PARENTAL RIGHTS UPHELD

The office received a favorable decision in a supreme court appeal of a termination of parental rights case, *E.A. v. DFYS*, Memorandum Opinion and Judgment #1065. Because the case involved a Native family, the termination proceedings were required to satisfy the Indian Child Welfare Act (ICWA) standards. DFYS had a long history of assisting the family; this termination involved the latest in a series of children to whom the parents' rights had been terminated.

The court took the opportunity to hold, for the first time, that where DFYS has been unsuccessful in assisting a parent to resolve a substance abuse problem, and the parent's rights to children have been terminated as a result, the nature and degree of the department's past efforts may be considered in determining whether the ICWA "active efforts" termination criteria have been satisfied for a current termination proceeding involving a later child. The court also began to explain *C.J. v. DHSS*, 18 P.3d 1214 (Alaska 2001), regarding the role of expert witnesses in ICWA cases. Unfortunately, the decision was issued as an unpublished MO&J. A motion to publish the decision as a formal opinion is before the

court. AAG Mike Hotchkin handled the appeal for the state.

## Legislation/Regulations

### MAJOR REGULATIONS PROJECTS APPROVED FOR FILING

During February the Legislation and Regulations Section prepared and edited on an expedited basis two supplemental appropriations bills, various tax bills, and a correctional facilities financing bill.

Additionally, the section facilitated the legal review of the first bill that passed this session for a special appropriation for energy development efforts (CSHB 334(FIN)).

Finally, the section completed reviews of regulations concerning child care assistance and pre-elementary schools, education programs for gifted children, rural airports, auto emission control system requirements, financial assistance through the Alaska Clean Water Fund and Alaska Drinking Water Fund, use of pesticides, long-range statewide transportation planning, and miscellaneous fish and game and occupational licensing matters.

## Natural Resources

### SPLIT DECISION ON LOG TRANSFER FACILITY (LTF) PERMITS

EPA issued two general permits authorizing the discharge of bark from logging operations into marine waters in coastal Alaska. Logs rub together and abrade bark as they are placed in the water, bundled up, and hauled away. Over years, bark piles, which decompose slowly, accumulate on the ocean floor, smothering some benthic species. ADEC certified that the permits comply with state law and authorized

“zones of deposit” (ZODs) for the resulting bark piles.

The Natural Resources Defense Council (NRDC) along with other environmental groups, challenged the EPA permits in the Ninth Circuit and the state’s certification before an administrative hearing officer. We recently received a proposed decision in the state case, which generally upheld DEC’s certification. A few days later, the Ninth Circuit ruled that EPA erred by not allowing public comment on the change from a one-acre ZOD to a ZOD that corresponded to the project area of the LTF. EPA and DEC are now coordinating the further public notice to be offered by EPA, and the question of how to regulate the LTF industry during the interim.

### **SOUTH COAST SETTLES**

South Coast, Inc., a small asphalt plant has agreed to pay (in a settlement agreement) a \$10,000 penalty with \$5,000 suspended contingent on the state issuing no notices of violation to South Coast for any alleged failure to comply with any monitoring, record keeping, or reporting requirements in violation of 18 AAC 50. An notice of violation was issued based on South Coast's failure to obtain a construction permit and this settlement agreement was based on that NOV.

### **HARRIS SAND & GRAVEL**

Harris Sand and Gravel entered into an agreement with the state based on the company’s failure to comply with its permit by allowing particulate matter emissions to exceed the standard. Harris Sand and Gravel has paid \$13,500 of a \$27,000 penalty. The plant is now disassembled with no future operations planned. The \$13,500 is suspended and contingent on the state issuing no notices of violations and on HS&G fulfilling certain obligations in the event it begins operations.

## **BOARD OF FISHERIES MEETING**

Attorneys from the Natural Resources Section assisted the Board of Fisheries at a rulemaking meeting for Upper Cook Inlet areas February 6 through 20. The meeting resulted in a regulations package of over 100 pages, most of which represents fine tuning of commercial, sport, and personal use management measures already in place.

### **STATE APPEALS EASEMENT TERMINATION**

AAG John Baker filed a notice appeal and petition to stay a Bureau of Land Management decision terminating a public trail easement near Unalaska reserved for many years under Section 17(b) of ANCSA. BLM had initially decided to terminate the easement in 1997, due to its own failure to reserve a site easement at the trail’s terminus. After determining that they could not defend that initial decision, BLM agreed to a remand. In December 1999, BLM issued a new decision reinstating the easement, but after objections from the underlying landowner vacated the decision on remand. Now, two years later, BLM has come up with a new theory: that the easement was improperly described all these years, and, in fact, never existed in the first place. The agency has not explained why the trail actually exists on the ground. Our opening brief was due March 11 but will be extended to accommodate an information request made on behalf of ADF&G under the Freedom of Information Act.

### **Oil, Gas, & Mining**

### **TAX AUDIT DISPUTES SETTLED**

The Anchorage OGM Section helped the Tax Division in the Department of Revenue settle production tax audits with two of the state's major oil producers for the tax years 1997

through 1999. The issues included the taxable value of the crude oil and the appropriate deductions for marine transportation costs. One settlement garnered approximately \$14 million, the other \$9 million, including interest.

### **PT MCINTYRE REHEARING DENIED**

It's official - we won the Pt. McIntyre case (*Exxon v. State*, reported in the October 2001 Monthly Report). In February, the Alaska Supreme Court denied Exxon's petition for rehearing of the court's opinion affirming decisions of the Commissioner of Natural Resources regarding unitization of the Pt. McIntyre oil and gas leases. Calls to Exxon's counsel to find out whether Exxon plans to take this case all the way to the United States Supreme Court have not been returned.

#### **Special Litigation**

### **WORKERS' COMP PAYMENTS REDUCED**

The Alaska Workers' Compensation Board granted a 100 percent offset reduction of compensation payments, allowing the State of Alaska, as employer, to recover overpayments based on the claimant's failure to identify social security benefits he was receiving. The workers' compensation statutes allow the offset of social security payments when an injured worker is also receiving workers' compensation benefits. The case was handled by AAG Kristin Knudsen; the board decision is No. 02-0020 (February 1, 2002). The claimant will likely appeal the decision. AAG Knudson has already participated in three board hearings, an appeal, and several motions for reconsideration on this matter.

### **RELITIGATION OF CLAIMS BARRED**

A pro se litigant cannot re-file claims she already lost in a previous lawsuit against the state stemming from a conservatorship placed

on some of her financial assets, according to a recent summary judgment order. Superior Court Judge Larry Weeks found that the judgment in the earlier case, which was affirmed by the Alaska Supreme Court, bars relitigation of most of the plaintiff's putative tort claims in her current case. The only new legal theory, related to alleged satellite surveillance of the plaintiff, who lives in Washington State, by an unidentified agency of the State of Alaska, is foreclosed because the plaintiff has no evidence to support it. Plaintiff's request for reconsideration of the adverse summary judgment ruling has been denied. A motion to seek relief from judgment is pending, but the time for filing an appeal has run. The state is represented by AAG Susan Cox, who also handled the earlier lawsuit involving the same plaintiff.

#### **Transportation**

### **RURAL AIRPORT REGULATIONS COMPLETED**

AAG John Steiner completed work on a 285-page package of regulations governing Alaska's rural airports. John received considerable legal help on this multi-year project from contract counsel and former deputy AG Ron Lorensen and from regulations attorney Deborah Behr.

### **PARKS HIGHWAY CONDEMNATION**

Judge Gleason issued a favorable interim ruling in a Parks Highway condemnation case. DOT&PF acquired a parcel through condemnation. DOT&PF paid its appraised estimate of just compensation for the land and improvements to the condemnee. DOT&PF allowed the condemnee to temporarily retain possession. The condemnee dismantled a building and removed it to another location. DOT&PF argued that the value of the building had been included in its appraisal and had



been paid to the condemnee. DOT&PF sought authority to offset the value of the building from any final condemnation award. The court ruled that DOT&PF could seek the value of the building as waste committed by a tenant.

## Criminal Division

### **ANCHORAGE**

Five young people were charged with kidnapping and assault in the second and third degree for the beating of a 16 year-old boy. On Friday evening, the boy and a friend went to a trailer. While inside, he was jumped and beaten. The boy had hand-sized letters "B-B-C" carved into his back and was pistol-whipped during his ordeal. On Sunday morning, the boy managed to chew through duct tape and escape.

Susan Osborne pled no contest to assault in the second degree for shooting her friend. Osborne had been binge drinking for several days and had stopped taking her medication for mood swings. For unknown reasons, Osborne, after entering her friend's home, began threatening her friend with a gun. Her friend fled to the bedroom. Osborne shot her in the hand as she tried to keep the bedroom door shut. Police were held off for five hours before Osborne emerged from the house pointing the handgun at the responding officers. Two officers shot Osborne in the shoulder. Osborne received six years in jail with two years suspended and four years probation.

Gregory Poindexter was sentenced to 30 years in jail, with an additional 35 years suspended for kidnapping and sexual assault in the first degree. Poindexter approached women early in the morning and offered them rides. He would take them to a remote area, rape them, and then drop them near their homes. Some of the women would willingly

accept rides, while others were taken against their will. The violent nature of the assaults escalated with the final victim suffering several broken facial bones.

Michael Lee was charged with 20 counts of sexually abusing three minors. Lee had lured the girls with candy and gifts and had been abusing them since last summer. The three minors lived in the same trailer park as the defendant. Lee's wife came home and found one 11-year-old victim naked in her bed. The wife later reported the incident to police.

Ronald Frank was sentenced on two consolidated counts of furnishing alcohol to a minor. Frank's co-defendant, Michael Hunter, was sentenced on one consolidated count of furnishing alcohol to minors. Frank and Hunter provided alcohol to a group of underage teens, including 19-year-old Robert Esper. After the party, Esper eluded police at high speed throughout the streets of Anchorage. Esper eventually crashed head-on into an Anchorage Police Department (APD) squad car. The crash resulted in the death of four persons, including APD Officer Justin Wollam, and the injury of a fifth person. Frank received the maximum possible sentence of two years and a \$10,000 fine. Hunter received a sentence of eight months.

### **BARROW**

A Barrow jury acquitted a defendant of robbery. A previous jury had convicted his co-defendant for beating a local man with a weapon and robbing him. Two other felony DWI defendants plead out before trial.

ADA Sara Gehrig came from Fairbanks to prosecute Andy Ritter. After a two-week trial the jury convicted Ritter of six counts of sexual assault. Ritter had previously pled to a single count under a plea agreement, but had subsequently been allowed to withdraw his plea. He now faces sentencing for assaulting three separate victims.

## **BETHEL**

Michael David, Jr., was found guilty of sexual assault in the first degree, burglary in the first degree, escape in the second degree, violating conditions of release, and assault in the fourth degree after a jury trial.

Myron Jenkins was found not guilty of sexual assault in the second degree after a jury trial.

The Alaska State Troopers, as part of the alcohol enforcement grant, conducted a major operation in Bethel resulting in the arrest of 9 people for sale of liquor without a license. Those arrested include James Cragg, Daphne Kristovich, Alexie Mike, Jonathan Daniel, Justin Edwards (3 counts), Jung Ho Yi, Michael David, Norbert Kashatok, and William Nicholai. More arrests are expected.

February Grand Juries: Nicholas Smith - felony DWI; Garrett Moses - 2 counts of assault in the third degree; Victor Bell - sexual abuse of a minor in the first degree; David Cluchey - felony importation of alcohol; Gary Kilbuck - assault in the third degree; Ramona Sanford - forgery in the second degree in a case that involved altering a prescription; Joseph Bill - sexual assault in the second degree; Peter Lomack - felony DWI and felony refusal; Louie Kinegak - sale of liquor without a license; and Nellie Kameroff - possession of alcohol with the intent to sell.

## **FAIRBANKS**

Judge Pengilly found Mark Andrews guilty of first-degree murder and robbery. The murder took place in Nenana. A co-defendant who pleaded to felony murder testified that Andrews was the shooter.

Kelly Kea was convicted of several counts of indecent viewing and photography. Kea had set up a video camera in his bathroom, and recorded a young female resident in various states of undress. Significantly, Kea also captured himself on film adjusting the camera.

His defense was that it was just a normal home security system, and he had inadvertently filmed the girl. He was unable to explain what valuable items in his bathroom justified video surveillance.

After deliberating three hours, a jury returned a guilty verdict for murder involving the shotgun death of a Kaltag man. The defendant had claimed that he accidentally discharged his weapon while trying to get the victim to leave his house. The victim and the defendant's mother-in-law were seated at a table, and the defendant fired from a distance of approximately 10 feet.

A Tok jury heard evidence at a trial of a Canadian woman charged with burglary and theft of a firearm from a local residence. The defendant claimed the victim owed her money, and that she accidentally broke a window at his residence while knocking for entry, and that she did not form the intent to steal his firearm until after she climbed through the window and over his couch. The jury acquitted on burglary but convicted on the firearm theft.

The office welcomed John Richard, lately with the Ombudsman's Office and formerly the Anchorage Municipal Prosecutor. John will be doing general trial work for the Fairbanks DAO. Kim Stone transferred from OSPA to the misdemeanor unit at the end of the month. She replaces Jean Seaton, who reports to the Bethel DAO on April 1. Jonelle Stephens returned to the office as receptionist after a few years in the University of Alaska system. Jonelle was formerly a secretary with us and will be a welcome addition to the staff.

## **JUNEAU**

Richard Warren from Haines was convicted of sexual abuse of a minor in the first degree.

Travis Nashoanak was charged with driving while intoxicated and four counts of reckless endangerment after his wife, while drunk, ran her vehicle into a wall injuring three of the four

children in the vehicle. She was charged last month with several felonies arising out of this conduct. The charges against her husband were filed when it was learned that he was passing a bottle of whiskey between himself and his wife. He is charged on an aiding and abetting theory for the driving while intoxicated and a parental responsibility for the reckless endangerment.

George Shavers, who was convicted last year of threatening his girlfriend with a knife, was charged this month with assault in the first degree for stabbing a person in the head with a knife.

A man was charged with driving while intoxicated. He told the court that he was taking Naltrexone with beer chasers.

Brian Bevelhymer was charged with assault in the first degree for interfering with the medical care of his 8-week-old premature infant by disconnecting the child from oxygen and then beating the child. Eleanor Kaye was also indicted for assault in the first degree for her interfering with medical care for the same child.

Jonathan Guthert was indicted on 16 counts of forgery and 16 counts of theft. In January, he had been indicted for forging a prescription and obtaining a Schedule IA controlled substance. A co-defendant, Mark Vincent, was charged with three counts of forgery in the second degree and three counts of theft in the second degree.

## **KENAI**

Joshua Hale was tried for taking a sub-legal sheep. Hale was allowed by the court to proceed pro se. He has a very large family who attended the entire proceeding and sang in the halls of the courthouse during breaks. There are 17 members in the family, and Hale's dad sat at counsel table throughout. The major issue was the definition of full-curl ram, and the carcass was brought into the

courtroom to illustrate the size of the ram, adding to the aromatic experience of those attending. Defendant had killed a 7/8ths curl ram in the wee hours of the final day of the Dall sheep hunting season. In fact, the defendant shot two sub-legal sheep: the 7/8ths curl ram that he was prosecuted for, and a 3/4 curl ram that was not prosecuted based on his claim that the smaller sheep was only killed because the bullet passed through the larger sheep and seriously wounded the smaller sheep. After viewing the two sheep for themselves throughout trial, the jury quickly returned a verdict.

Two trials were held in Homer. One jury found Andrew Taggard guilty of DWI after evidence showed that his breath alcohol level was .08%. Colin Runak was found guilty of reckless driving. The evidence of reckless driving was that the officer had stopped Runak for speeding (10 miles over the limit) and Runak had a BAC of .078%.

Debbie Moore of Homer was indicted for theft in the first degree for taking more than \$300,000 out of a business trust fund.

Patrick Herrin was finally sentenced for stalking in the first degree. The conviction arose from numerous threatening letters sent by the defendant to his ex-wife. Herrin sent the letters from Wildwood Correctional Facility, where he was serving a sentence for assault in the third degree and stalking in the first degree on his ex-wife. He was about to be released when indicted. The defendant received a composite sentence of 5 ½ years to serve. In addition, the court revoked part of his suspended time on the prior felony.

## **KETCHIKAN**

Clinton Baker was sentenced to 75 years imprisonment with 25 years suspended (50 years to serve) on his murder in the second degree conviction. He was convicted of killing the boyfriend of his mother by almost cutting off his head with a splitting maul. The judge also

recommended that he not be released on discretionary parole.

Two domestic misdemeanor assault trials ended with one guilty verdict and one not guilty verdict. Larry Rudick was convicted of assault. He was driving with his wife and child when she started to scratch him during an argument. Instead of stopping the car, he hit her so hard in the mouth that he knocked her teeth out. The state agreed that he could defend himself, but argued that he used too much force. Tim Torrell was found not guilty of assault. He shoved his wife out of a car causing an injury to her knee. The defense argument was that she wanted to get even with him and not only divorce him but get him kicked out of the Coast Guard. His being discharged from the Coast Guard if convicted was the deciding factor for the jury.

Michal Kaplan was indicted for robbery in the first degree. She went into a busy restaurant and pulled a knife on the cashier, demanding money. The cashier got help from customers who surrounded Kaplan while holding chairs until the police arrived. At her felony appearance, she asked to go to API and stated that she had been found not guilty in Montana by reason of insanity.

Paul Corpus was indicted for two counts of sexual abuse of a minor in the second degree and indecent exposure in the first degree. In Wrangell Gary Hamley was indicted for burglary in the first degree and theft in the second degree for entering his brother's house and stealing rifles belonging to his brother and his mother and selling them to a friend.

In Ketchikan Matthew Stacy was indicted for burglary in the first degree and theft in the second degree for breaking into a friend's house and stealing his handgun. George Jackson was indicted for criminal mischief in the second degree for kicking and punching holes in the hall walls of an apartment building after getting mad at being thrown out of an apartment. Others were indicted for failure to

appear, felony DWI, and misconduct involving controlled substance in the fourth degree.

## **KODIAK**

A Kodiak man was sentenced to 18 months with 17 months suspended, and placed on probation for 4 years, following his conviction for perjury. The defendant had been convicted of driving with a suspended license last year and had been ordered to perform 80 hours of community work service. He lied in his community work service log which was provided to the court subject to the penalties for perjury. The defendant was ordered to now perform 160 hours of community work service.

A Kodiak man was convicted of assault in the third degree and sentenced to serve 9 months in jail for his part in last June's attack on an off-duty Kodiak police officer. A second accomplice had earlier been convicted of felony tampering with evidence and had received a 4-month sentence. The third co-defendant, the principal attacker, who has been charged with attempted murder, has a September trial date pending.

A Kodiak minister and his wife have both been indicted for forgery in the second degree after their purchase of a Kirby vacuum cleaner in the name of the wife's recently deceased father. In making the purchase the husband had presented a credit card of his deceased father-in-law as identification and then signed his father-in-law's name to the contract and financing documents for the purchase of the vacuum, both of which had been co-signed by his wife (daughter of the deceased).

Kodiak set an all-time record for snowfall during the month of February with 54 inches of snow during the month.

## **KOTZEBUE**

Members of the Kotzebue WAANT (Western Alaska Alcohol and Narcotics Team) seized a total of 122 bottles of alcohol in a single shipment at Northern Air Cargo in Kotzebue.

Apparently one bottle broke in shipping, alerting NAC employees, who then notified the police. Michael McBride of Kotzebue was charged with one felony count of bootlegging and three misdemeanor counts involving improper labelling of alcohol shipments sent by common carrier. The WAANT unit also intercepted a case of whiskey destined for the dry village of Point Hope; one suspect has been charged in that case. ADA Windy East attended a three-day SART training in Nome. Mike Burke, from Anchorage, covered the Kotzebue office during Windy's absence.

Mahlon Uhl, Jr., was acquitted by a Kotzebue jury on charges of possession of cocaine and violation of release conditions. Uhl was also sentenced on an earlier cocaine possession case tried last fall (the state had better luck with that jury). Cyrus Adams was indicted on a sexual abuse of a minor offense and trial has been scheduled for later this spring. The office was closed for a day due to a frozen/overflowing sewer line. It has since been cleaned and is back to normal.

### **NOME**

The office prosecuted two very similar sexual assault trials in February. Timothy Katchatag was convicted of sexual assault involving an incapacitated victim occurring in the village of Shaktoolik last fall. Less success was had in a similar incapacitated victim case from Teller; defendant Vernon Kugzruk was acquitted by a Nome jury. However, Judge Esch found sufficient evidence to revoke his probation from a previous sexual assault on an incapacitated victim.

A young woman from Gambell has been charged with a felony assault for intentionally hitting another Gambell resident with a four-wheeler. According to witnesses, the defendant had made six or seven passes at the victim, trying to hit him, before she managed to strike. In another case from Gambell, the troopers were investigating the shooting of a female victim at a residence in

Gambell. The victim was medivaced and her male companion arrested on a probation violation (the shooting turned out to be self-inflicted). Gambell resident Salvadore Campbell, taking advantage of the absence of the occupants of the residence, burglarized the house, looking for alcohol he thought would be there.

### **PALMER**

Andrew Coffman was indicted in late January for attempted murder in the first degree, assault in the first degree, burglary in the first degree, and assault in the third degree for an incident in which he chased the current boyfriend of his obsessive love interest into a house and, when confronted by a 75-year-old woman with a gun, shot her in the face, shattering her jaw. Over the state's objection the bail was reduced to \$10,000 cash appearance and performance and he was placed in the third-party custody of his parents. Within a week of his posting bail the defendant skipped out on his parents, contacted the victim of his stalking conduct, wrote out a detailed plan for murder/suicide, and then ran for the border. He made it barely across the border, on foot, but was contacted before actually reaching the Canadian border station, which is located some distance inside Canada. Since he hadn't actually entered Canada yet, he was taken into custody by Alaska Troopers and brought back into Alaska. New charges are being prepared, and a move to forfeit the cash bail previously posted is in the works. The state will be asking the court to hold the forfeited bail for potential restitution pursuant to AS 12.30.075, the new statute that became effective in January 2002.

A jury convicted Danny Wood of coercion, assault in the fourth degree, and violating a domestic violence protective order. After the trial, he also pled to burglary in the first degree. According to the victim, Wood was in her house when she came home, attacked her, strangled her, and restrained her against her will for approximately four hours. Wood was arrested a month after the assault in Missouri.

Seven defendants in drug cases were indicted this month: three for sale of cocaine, three for manufacture of methamphetamine, and one for growing marijuana. Two defendants went to trial for growing marijuana and possession of cocaine. The investigation was initiated based upon an anonymous tip. The defendants were growing marijuana in a home where they did not live. The property and utilities were in the name of an individual who lived out of state. During the search at the grow, Merit and Camel cigarette butts were found. The defendant's vehicles had been seen at the residence during the investigation. After fingerprinting forty bottles and soda cans from the grow, one fingerprint of one defendant was identified. The investigators seized the door and deadbolt locks from the residence. Based upon finding the grow, a contingent warrant was served at the defendants' home. Each defendant had a key that unlocked the seized locks from the grow site. It was noted the defendants each smoked, one Merit and one Camel cigarettes. Scales, baggies, and marijuana residue were located in the master bedroom, although the total weight of marijuana in the defendants' home was only a couple of ounces. Defendants had receipts reflecting they were depositing \$900 a month in an account for the homeowner of record on the grow site and paying utilities on the property. Additionally, a cocaine grinder coated with a "trace" of cocaine was found in the defendants' bedroom. The defendants argued at trial that they collected rent for the landowner at the marijuana site, but did not manage the property or have access to it. They determined the ex-spouse of one defendant had provided the anonymous tip during a custody battle and attempted to show she had planted the evidence to frame them to win custody. To make the evidence fit the facts, they argued the ex-spouse was working with the investigators and planted the evidence in their bedroom after she was notified the search was about to occur. Both defendants were represented by the same counsel. One testified and one did not. The jury didn't buy

the defense and returned guilty verdicts on both defendants as to all six counts.

Thomas Hood, owner of the Mile 49 Café, was convicted after a bench trial of assault in the fourth degree (fear assault). Hood lost his temper after arguing with his wife and then with a 17-year-old waitress. When an older female customer attempted to assist the young girl, Hood directed his anger at her. The case was unusual in that it pitted various factions in the community against one another. Hood was the volunteer community fire chief and was relieved of his command due to the incident. He was sentenced to probation with suspended jail and to attend anger management.

A meth-making defendant charged with sexual abuse of his 6-year-old daughter said, "I love you, I love you soooo much!" when the girl took the stand at trial. When she started to testify, he started making sobbing sounds. Despite admonitions, he kept up his distracting antics. She suddenly "forgot" what he did but said she told the truth to the investigator. Defendant spoke to her as she left, escorted by the judge and prosecutor. The prosecutor, maintaining a position in defendant's line of sight, was told in a loud voice, "Out of the way, punk!" The jury was admonished that they should disregard the outburst.

## OSPA

(Office of Special Prosecutions & Appeals)

### Personnel News

Kim Stone left OSPA to join the Fairbanks District Attorney's Office.

Terisia Chleborad joined OSPA to fill the position created by Kim's transfer. Terisia formerly worked in the civil division of the Department of Law representing the Child Support Enforcement Division, and before that was an associate attorney with Lane Powell Spears Lubersky.

## Prosecution News

**Tucker convicted for importation of alcohol.** Nellie Tucker pled no contest to importation of alcohol. She was sentenced to 180 days with 180 days suspended and a fine of \$500 with \$250 suspended and was placed on probation for two years. Tucker was caught sending six bottles of alcohol into Emmonak.

**Nash convicted for attempted importation and alcohol transportation violation.** Elizabeth Nash pled no contest to attempted importation of alcohol and an alcohol transportation violation. Nash was sentenced to 180 days with 180 days suspended for the attempted importation and 120 days with 120 days suspended for the transportation violation; she was placed on probation for two years.

**Vanilau convicted for illegally disposing of liquid waste.** Leo Vanilau pled no contest to illegally disposing of waste. Vanilau was a Service Master employee who chose to dump the leftover water from his job into Ship Creek. Vanilau was fined \$800 and placed on probation for one year.

**Fish and Game.** The Fish and Game prosecutor convicted several defendants for commercial fishing violations. He collected over \$20,000 in fines and forfeitures for the state.

## Civil Litigation News

**Sex offender registration update.** On February 19, 2002, the U.S. Supreme Court granted the state's petition for certiorari from the Ninth Circuit's decision in *Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001). In *Doe v. Otte*, the Ninth Circuit held that Alaska's sex offender statute violated the Ex Post Facto clause of the U.S. Constitution. *Otte v. Doe*, No. 01-729.

On February 15, 2002, the state filed a notice of appeal from the recent order of U.S. District Court Judge Holland enjoining the prospective enforcement of Alaska's sex offender registration law as to all defendants with single sex-offense convictions arising from conduct that occurred before August 10, 1994. Judge Holland based his injunction on the Ninth Circuit's decision in *Doe v. Otte*. *Godfrey v. Doe*, No. 02-35208.

## Petitions & Briefs of Interest

### Petitions of Interest

**Immunity.** After ruling that two crucial state witnesses in a murder case had valid Fifth Amendment claims, Judge Wolverton ordered the state to grant the witnesses transactional immunity from all federal and state prosecutions. In a petition for review to the court of appeals, the state argues that it has no power to immunize a witness from federal prosecution; federal use-and-derivative-use immunity springs automatically from a grant of state transactional immunity. The state also argues the judge should have considered other means to recognize the witnesses' privilege, for example, limiting cross-examination to allow full exploration of their bias, but avoiding incriminatory answers. *State v. Wade*, No. A-8242.

**Restitution.** The court of appeals ruled that a sentencing court could not order restitution for accounting help donated by volunteers to assist the victim, a non-profit organization, in recovering from an embezzlement crime. In a petition for hearing to the Alaska Supreme Court, the state argues that the court of appeals' narrow reading of the restitution statutes is contrary both to the express legislative intent behind the statutes and the public policy that victims of crimes should be fully recompensated. The state also points out

other incongruities created by the court of appeals' reading of the restitution statutes. *State v. Demers*, S-10525.

**Sentencing.** The court of appeals ordered the resentencing of a defendant after Judge Link opined – in response to the court of appeals' remand for further findings – that the 22-year sentence he had previously imposed for a DWI homicide in which two people had died and one was seriously injured was “improvidently entered and excessive.” In a petition for hearing to the Alaska Supreme Court, the state argues that (1) the court of appeals' action violates Criminal Rule 35(b)'s 180-day time limit on sentence modifications, (2) the sentence was not excessive and Judge Link's original findings were sufficient, and (3) the court of appeals ordering the resentencing of the defendant without itself first having found the sentence excessive violates the victims' constitutional rights. *State v. Glaser*, S-10505.

## Briefs of Interest

**Victims' rights statutes.** In the trial court, the state successfully defended against an equal protection challenge of those victims' rights statutes that (1) prohibit defense representatives from surreptitiously recording the interviews of the victim or witnesses to sex crimes, and (2) require the defendant's representatives to advise the victim of her right not to be interviewed, to have a third person present if she wishes to be interviewed, and to have a copy of her statement if the interview is recorded. The criminal defense attorneys who brought the challenge have now appealed. On appeal, after giving a brief history of the statutory and constitutional rights of victims, the state argues that the defense attorneys challenging the statutes lack standing to sue, the state is not a “person” for equal protection analysis, and defense attorneys and prosecutors are not “similarly situated” for equal protection analysis. *Murtagh, et al. v. State*, No. S-10240/10250.

**Race-switching jury instruction.** The state argues it was not error for the trial court to deny the defendant's request for a jury instruction directing the jurors to switch the race of the defendant (an African-American) with the victim (Caucasian) to see if it would impact their consideration of the evidence. The idea of this “race-switching exercise” originated in a law review article that suggested without such an exercise jurors unintentionally rely upon racial stereotypes when deciding, in self-defense cases, if a defendant's response to the victim was reasonable. The state argues this was not a case involving a claim of self-defense and race was not relevant to any other issue in the trial. *Andrus v. State*, No. A-7673.

**Private search.** A boy turned over to the police a videotape that he had taken from his adult uncle's locked bedroom after informing them that he (the boy) had viewed a portion of it and that it showed his uncle having sex with his underage cousin. The state argues that the trial court properly found that the police were not required to obtain a search warrant to view the incriminatory parts of the tape because the Fourth Amendment does not apply to private searches, even if they are unauthorized or illegal, because the police do not exceed the scope of the private search. The state alternatively argues that the contents of the videotape would have been inevitably discovered. *Paul v. State*, No. A-7773.

## Court Decisions of Note - Alaska

### Statute and Rule Interpretations

**First-degree vehicle theft.** The court of appeals interpreted AS 11.46.360(a), the first-degree vehicle theft statute, as requiring that the initial act of taking the vehicle be trespassory. *Dobberke v. State*, Op. No. 1787 (Alaska App., February 8, 2002).



**Restitution.** The court of appeals interpreted AS 12.55.100(a)(2), the statute allowing for restitution to victims for damages or losses arising from a crime, as not allowing restitution for accounting help donated to a non-profit organization. *Demers v. State*, Op. No. 1788 (Alaska App., February 8, 2002).

**Other sex abuse evidence.** The court of appeals held that the admission of other sexual abuse committed by the defendant in a sex abuse prosecution is governed by Evidence Rule 404(b)(2), not Rule 404(b)(4). *Carpentino v. State*, Op. No. 1790 (Alaska App., March 1, 2002).